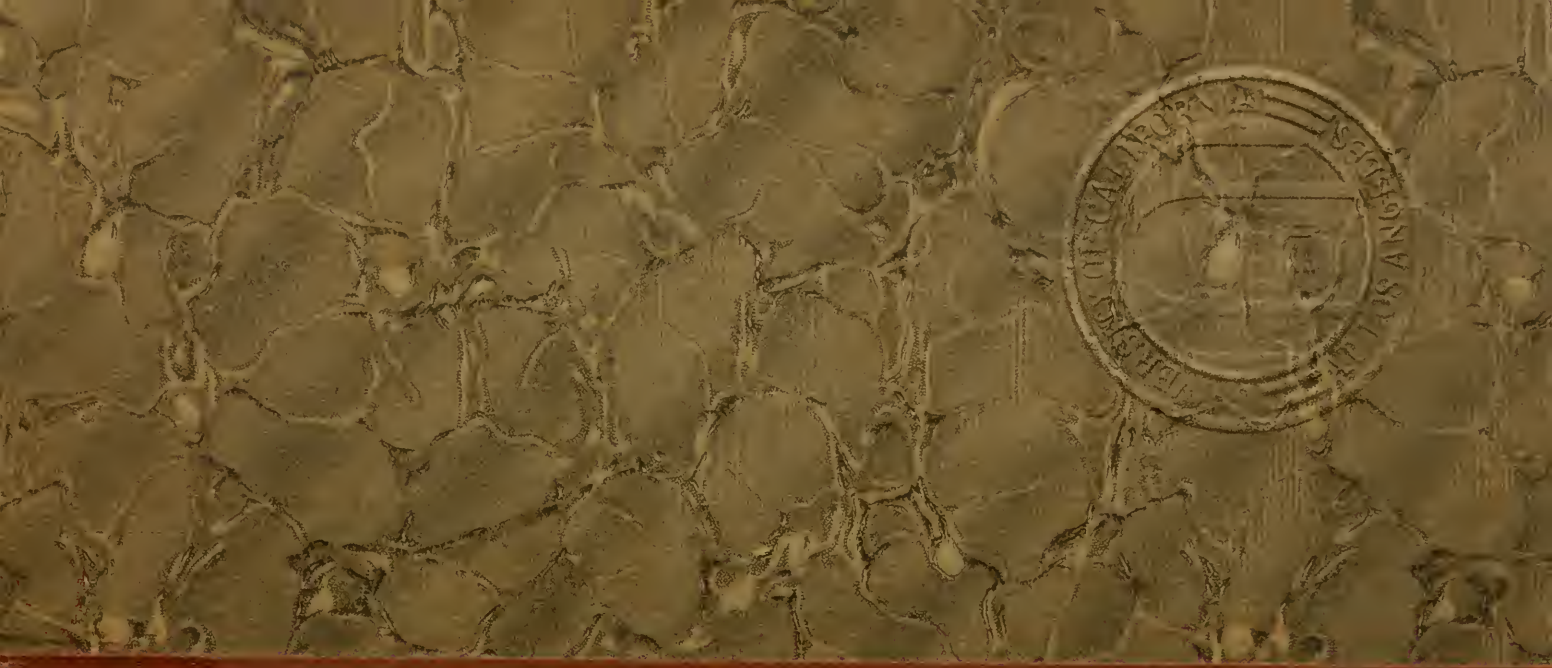

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DRAPER — TRADE UNIONS AND THE LAW

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TRADE UNIONS

AND THE LAW.

BY

WARWICK H. DRAPER, M.A.

(OF LINCOLN'S INN, BARRISTER-AT-LAW).

A Paper read in March, 1906, to the Members of the Hampshire House Social Club, by Hammersmith Mall, and the Peel Institute, on Clerkenwell Green.

LONDON:

STEVENS AND SONS, LIMITED,

119 & 120, CHANCERY LANE,

Law Publishers.

1906.

PRICE SIXPENCE.

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NOTE.

This Paper was written in its entirety in the interval between the issue of the Report of the Royal Commission on Trade Disputes and Trade Combinations and the sharp debates in the House of Commons on the 28th and 30th March on the Government and Labour Party Trade Disputes Bills, which will be found in an Appendix.

As an effort by way of "peaceful persuasion for the purpose of peacefully obtaining or communicating information," it evoked a keen exchange of diverse opinions among those, both unionists and non-unionists, for whom it was primarily prepared. They spontaneously asked that it might be printed, and I venture to have this done as a contribution to the public discussion of the questions involved.

I write this fore-note on the morning after listening to the former of the debates above referred to, and I feel sure, if I may respectfully say so, that many members may have given pledges on the subject, no doubt honestly, but without full consideration of what is involved.

The Labour Party will insist on seeing the question thrashed out, but they ought to recognize the fact that the important thing is not whether the "Taff Vale" decision altered the supposed law, but whether it does or does not lay down what social justice requires in accordance with both law and fair play.

W. H. D.

12, New Square, Lincoln's Inn,
29th March, 1906.

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TRADE UNIONS AND THE LAW.

(March, 1906.)

The increment of Labour Representatives in the British Parliament will, after all, remain the outstanding feature of the General Election of 1906. There is a certain pathos in the lament of the ancient nobleman who wrote to the authoress of some patriotic ballads that he was too distressed by the returns of the polls to read her verse, which he accordingly returned! The wonder is that the working men of England, in their thousands, should have been so long in giving full play to their franchise.

But impartial observers who during recent years have watched the ill-reported deliberations of the annual Trade Unions Congress, or have gauged the sagacity (or lack of it) of some of the well-to-do and even aristocratic supporters of the advanced Socialists, or, best experience of all, have come into personal touch at working-men clubs and institutes with men, unionist and non-unionist, to whom the aspirations and needs of "Labour" are a daily reality, do not pretend to be surprised at the new phase in politics. The native conservatism of the British temperament may be relied upon to prevent excess or extravagance in reform, but there is no doubt that Trade Unionism, strongly organised and forceful in fitting plans to ideas, will engage the attention of Parliament and the public in anxious debate for many a day to come. That it cannot be otherwise must be admitted by

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those whose minds may be inclined, consciously or unconsciously, against the combination of working men, but must feel the cogency of such facts as that at the end of 1904 there were no less than 1,866,755 registered trade unionists in the country (6·7 per cent. of whom were women and girls) belonging to 1,148 unions, in spite of a declining membership in the smaller unions; that contributions per head averaged 33*s.* 5*d.* in 1904; that the income and expenditure had both increased, the former to £2,097,470 and the latter to £2,042,000, while the accumulated funds stood in 1904 at £4,616,230, almost at £4 2*s.* per member, or more than twice as much as in 1895. It is noteworthy that there has of recent years been a distinct increase in the groups of employés of public authorities and of shop assistants.

The Board of Trade has shown the following proportions of every £1 spent during 1904 on the objects of the 100 principal trade unions, viz.:—

	s.	*d.*
(a) Unemployed benefit . . .	6	4
(b) Disputes	1	3
(c) Sickness, superannuation, &c. .	8	4
(d) Working expenses . . .	4	1

It is not unimportant to note that this amount spent on disputes was less than one-fifth of that spent in 1897, prior to the legal decisions of which the cause of Trade Unionism chiefly complains.

The unions actually affiliated with the Labour Representation Committee have a combined membership of over 900,000, each member paying a shilling a year towards its funds. This striking party fund, the development of which many working men even would welcome in lieu of general payment of members of Parliament, with its attendant risks, has gone far to send more than 50 Labour candidates to the hustings, and to secure the return of 60 per cent. of them.

That this state of things should not be otherwise in modern industrial England is probably felt even by those friends of

progress who are sensible enough to moderate their zeal by judgment and to realize that, in almost every problem, there are "two sides to the question." It is at any rate of the utmost importance that a right and open spirit should be inculcated for the discussion of these questions. The hearing of a trade dispute in the Law Courts, "not unnaturally" as the scoffer is likely to say, discovers much anger and sour unreasonableness; contemptuous treatment by employers, often the salaried managers of a limited company, is too frequently contrasted with the foolish obstinacy of the men, connived at, if not fostered, by their leaders. Just as, none too soon, many large firms and corporations employing labour are making the friendliest efforts to emulate that interest in the social welfare of their men which "masters" of guilds and smaller industries exhibited in bygone days, so we have travelled far from the need of saying with even Cobden, who felt that Trade Unions were founded upon principles of brutal tyranny and monopoly, "I would rather live under a Dey of Algiers than a Trades Committee." Many an engineer or carpenter can still unfortunately explain, in confidence to a sympathetic inquirer, how hardly the pressure of the union often works upon him, as, for instance, in the broken seasons of the London building trade. But, upon the whole, most reasonable people will subscribe to the opinion given in 1896 by Lord Justice Lindley, that Trade Unions "are the only means by which workmen can protect themselves from tyranny on the part of those who employ them." It is only fair to add his next sentence: "But the moment that Trade Unions become tyrants in their turn, they are engines for evil; they have no right to prevent any man from working upon such terms as he chooses." It is surely obvious, when a Judge of Lord Lindley's wisdom in human affairs, aloofness from party politics and equitable frame of mind, can speak of these opponent "tyrannies," that there is room for more reasonableness and common sense, not only in the settlement of trade disputes, but in the determination of the spirit in which crowded modern industry should be con-

ducted. One could have no better warning than the short-sighted decision of the Trade Unions Congress at Leicester, in 1903, not to give evidence before the Trade Disputes Royal Commission which has now at last issued its valuable Report. The abstention of the men, apart from the opportunity given to and taken by Sir W. T. Lewis in his powerful "minority report," must tend to offend that public opinion on which they themselves rely for a reformation of the law, none the less because they chose, with poor reason, to believe that the Members of the Commission were of a hostile disposition. The results rather show it to have been a most liberal minded Commission for the late Tory Government to have appointed.

It is the issue of this Royal Commission's Report which, in spite of the grumblers who deride such documents and themselves do naught but talk, serves to show the magnitude and the imminence of a struggle which the Labour Party will insist upon. Parliament very soon may once again, and under new conditions, be debating a Trade Disputes Bill presented by Mr. Hudson and backed by Mr. Shackleton and other leaders of the Labour Party.[1] Just as so many of the community, as employers or employed, manufacturers or purchasers, were ignorant or affected to be ignorant of the awakening of the Labour Party, so it is remarkable with what confused and timid thinking the essentials of this great question are approached. The "specialization" of society has reached such a pitch that, from many points of view, every group among the professions and trades is a kind of Trade Union. Barristers and doctors in reality rely upon the concept of a "trade combination" just as much as miners and weavers, although their forms and rules may not be, and, as the less favoured working man complains, do not require to be, so closely scrutinized or so jealously regarded. Partly by the survival of customs and partly by reason of the

[1] Since the above was written this Bill has passed its second reading by the enormous majority of 416 to 65 as a result of pledges given to electors.

natural results of competition for life's advantages, the fact is, fortunately or unfortunately for the rest of the community, that a few men become eminent in each trade and, one may also say, a few trades (or "professions") become eminent among others. But new political conceptions which have arisen since the days of Benthamism recognise that such competition among mankind should at least be so altruistic as to observe the dictates of that justice which regards the rights of others. For example, public opinion is now generally sensible of the fact that the sale of labour is unlike the sale of goods, or of the truth that an individual probably does not know his own interest or that of his class as well as the trade society or even the whole community of which he is a member. In the particular sphere in which this pamphlet is a contribution to the solution of a burning question, these conceptions gave rise to the Trade Union Acts of 1871 and 1876, which practically were based on the famous "minority report" of the late Judge Hughes and of Mr. Frederic Harrison. It is now urged by the Trade Unionists that the spirit and intention of that legislation have been violated by recent decisions of the Courts culminating in the "Taff Vale" judgments of 1901 in the House of Lords, and the Bills which the near future will bring before Parliament, like Mr. Whittaker's Bill of 1905, seek to undo much of the validity of those decisions.

It is, in the first place, most regrettable that the notion of a deliberate "set" by the Courts against Trade Unions should be fostered. It is in itself a breach of that mutually tolerant spirit in which alone these momentous issues can be decided. Mr. J. Ramsay Macdonald, the able Secretary of the newly-christened Labour Party, ought, as a publicist of growing repute, to know better than to speak of the "absurd decision" of Mr. Justice Farwell, or to say that "the House of Lords supported him in considering that there should be one law for employers and another for combined workmen."[1]

[1] "Independent Review," March, 1906.

Such ill-considered phrases only alienate the regard of those who wish well to his cause. The regret expressed by the Parliamentary Committee of the Trade Union Congress at Leicester in 1903 that "the Law Lords' decision . . . has militated so injuriously against the funds and the position of Trade Unions" is intelligible and correct; and few should quarrel with the declaration of Mr. W. B. Horridge (Secretary of the National Union of Boot and Shoe Operatives), the President for that year, that "he required no more from the other side than that which he was prepared to give. He wanted that they as organised workers should stand on an equality before the law with the employers of labour." This temperate and irrefutable language contrasts well with the dangerous doctrine expressed on the same occasion by Mr. B. Cooper (Cigar Makers' Mutual Association) that "no interruption of the industrial development of the country could be pleaded as a justification of the policy of restricting the power of trade organisations." The last speaker was better entitled to make his comment that "the power of attaching Trade Union funds was an unjust discrimination between the federations of the employed and those of the employers, the latter having no necessity for accumulated funds."

The truth is that the organisation of labour has come with such a rush during the last thirty years in France, Belgium, Germany, and Switzerland, and in our own colonies even more rapidly than in England, that the old antithesis between "self-help" and "self-defence" has assumed new proportions. In this lies the explanation of the batch of important cases which the English Courts have been called upon to decide. The common law, as modified by the several statutes already mentioned, had existed for a number of years before the most serious litigation began, and except for a few intermittent cases,[1] it would seem that, consciously or uncon-

[1] See the Appendix to Sir Godfrey Lushington's Report at p. 95 of the 1906 Report on Trade Disputes, which costs only 1*s.* 1*d.*

sciously, everybody was resting on the Hegelian dictum that "true freedom is only found within legal restrictions." But at last the famous "Mogul" case inaugurated the struggle which has familiarised public opinion with such terms as "combinations in restraint of trade," "watching and besetting," and "corporate liability for damages." It is this struggle which has given the Labour Party its great opportunity, but there is no reason why Mr. J. R. Macdonald should seek to suggest that "the attack upon Trade Unionism through the Law Courts" came from its antagonists. The whole affair is but a phase of the struggle between "trustified" Capital and organised Labour, in which the representatives of the latter, like the men in Mark Twain's story who, after thinking that for twenty years they were in prison, one morning walked out of the open door, have awakened and stepped out to demand their alleged rights.

Before considering the recommendations of the Commissioners and the demands of the Labour Party, it will be as well briefly to recapitulate the legal decisions of which the latter complain. The subject is a difficult one. The English language appropriate to it is unfortunately prolific, and it may be confessed that lawyers and Trade Unionists have vied with one another in ingenious attempts to twist the meaning of its phrases. But without entering here into the history of the modern emancipation of Trade Unions,[1] an examination of the judgments[2] and of the elaborate 1906 Report of the Commissioners, seems to justify this summary of the recent

[1] For which see works by Dr. Baernreither, Mr. Sidney Webb and Mr. Geoffrey Drage.

[2] Even the most accurate and fullest "reports" of the trials cannot reproduce much of the spirit and many of the circumstances of these controversies. It is, moreover, a pity that the jury system is calculated, in this respect, to produce a panel, especially in the case of "Special juries," likely to incline more to employer than to employed. As any one working in the English Law Courts knows, the subtle and even unconscious prejudices of class-feeling are more apt to be at work in jurymen than in judges and lawyers, whose whole training is calculated to suppress them.

decisions with regard to the what is called "Trade Union Conspiracy and Liability for Damages."

(A) Unfavourable to Trade Unions.

(i) A combination of A., B. and C. to damage X. in his trade, and by means of intimidation or coercion (including threats not only of bodily harm but also of serious annoyance and damage) to induce the customers or servants of X. against their will either to break their contracts with him, or not to deal with him, or not to continue in his employment, is, if it results in damage to X., actionable.

This decision, in effect, declares that there is a legal duty on A., B. and C. to refrain from intimidating or coercing X., his customers or servants, so as to prevent him from carrying on his own business in any lawful way he himself chooses.

(ii) If, without any legal justification, A. induces B. to break a contract with X., who suffers damage in consequence, or if A. by coercion or intimidation, or threats thereof, compels B. to cease dealing with or staying in the employment of X., who suffers damage in consequence, A. is liable to an action by X., and this even if B., in ceasing to deal with or serve X., does not break any contract with him.

(iii) A Trade Union may be sued in tort in its registered name, with the consequence that Trade Union Funds will be liable for any damages that may be awarded.[1]

(B) Favourable to Trade Unions.

(iv) An act which does not in itself amount to a legal injury, cannot be actionable merely because it is done with a bad motive.

[1] Lords Macnaghten and Lindley, in the "Taff Vale" case, further expressed an unhesitating opinion that any Trade Union, whether registered or not, can be sued in tort by means of a representative action.

(v) Acts done in concert by A. and B. solely for the purpose of protecting and extending their trade and increasing their profits, and which do not involve means in themselves unlawful, are not actionable, even though such acts cause damage to X.

These five propositions, which it is impossible to state accurately in less technical language, appear upon reflection unimpeachable to any mind which honestly examines all sides of the question. But so far as a problem so complex can be simply stated, most of the members of the new Labour Party and many of the orthodox Liberals are pledged strenuously to support a Bill, which, in extension of the principle that Trade Unions are now legal associations, shall give a statutory sanction to the above propositions (iv) and (v), but shall invalidate the "judge-made" propositions (i), (ii) and (iii).

In the first place it is to be regretted that so much allusion is made, in a growling spirit, to "judge-made law." It will be a bad and, as one believes, a distant day for England when the community is justified in thinking that the judiciary, as in some countries, is swayed by political or class bias. The truth, obvious upon reflection, is that there can scarcely be a single litigious relation between man and man in which the common law or statute law has not required some judicial interpretation for the determination of the question between them. For example, in whatever way the House of Lords had decided their judgment in the Irish Trade Union case of *Quinn* v. *Leathem*, their judgment would have amounted to judicial legislation. The ingenuity of circumstances, as it may be called, must always outdo the wit of a draftsman.[1]

And in the second place, the union-leaders do their own intelligence an injustice when they cry that "the Taff Vale decision altered the law as to liability." It did nothing of the kind. It removed an erroneous and hitherto untested

[1] Workers will surely recognise the remarkably liberal interpretation given by the judges, and rightly given, to the Workmen's Compensation Act.

impression that the unions were immune from any action at law for the wrongs they might commit. The question was strictly not one of liability but of procedure, a distinction not of legal language but of substantial importance. And it is as well to note that Mr. R. Bell, M.P., whose union paid £23,000 in lieu of himself being sent to prison, frankly stated to the Congress in 1903 that "in the Taff Vale case the rules (of the Union) were defied; the rules were violated; and if the executive had adhered to the rules there would have been no Taff Vale judgment!" It has only to be added that Lord Dunedin, Mr. Arthur Cohen, K.C., and Mr. Sidney Webb, whose recent "majority report" leans favourably to Trade Unionism, express themselves as satisfied that the law laid down in the case involved no new principle and was not inconsistent with the legislation of 1871.

Mr. Frederic Harrison, happily still with us to recall the great and successful effort made by himself and his colleagues of forty years ago on behalf of Trade Unions, has just vigorously protested that neither they nor Parliament intended, in 1871 and afterwards, that the unions might be sued and made liable in their collective funds for the wrongful acts of their officers and agents ("The Speaker," 17th and 24th March, 1906). One is bound to admit that this view seems to have been shared in by the late Lord Aberdare (Mr. Bruce) when, in introducing the measure as Home Secretary, he observed that the statute was not complete like "the Friendly Societies Act and the Joint Stock Companies Acts and the like, by means of which uniform rules would be framed for the formation, management, and dissolution of these associations." He added that "all questions of crime apart, the objects at which they (the unions) aim, the rights which they claim, and the liabilities which they incur, are for the most part, it seems to us, such as courts of law should neither enforce, nor modify, nor annul. They should rest entirely on consent." There is much to be said for this as a proposition of abstract justice, and one has more sympathy with it than with the technical point taken on behalf of the

Amalgamated Society of Railway Servants, viz., that such a union is neither an individual nor a corporation nor a partnership, and that they may therefore take advantage of the impossibility of suing and recovering damages from each of many thousands of workmen. But the point is that the Legislature in 1871, in legalizing Trade Unions, made them legal entities with perpetual succession, able to act by agents liable to penalties as well as their officers, capable of holding property as their own, and invested with the character of a party to appeals and proceedings. It is surely reasonable to say that such capacity, in the absence of express enactment to the contrary, involves the necessary correlative of liability to the extent of its property for the acts and defaults of its agents. If not, it means that the Legislature has authorized the creation of numerous bodies of men capable of owning great wealth and of acting by agents, with absolutely no responsibility for the wrongs that they may do to other persons by the use of that wealth and the employment of those agents. "They would be at liberty," as Mr. Justice Farwell continued, "to disseminate libels broadcast, or to hire men to reproduce the rattening methods that disgraced Sheffield thirty or forty years ago, and their victims would have nothing to look to for damages but the pockets of the individuals, usually men of small means, who acted as their agents." It is not, indeed, a question of the rights of members of a combination, but of the wrong done to persons outside the combination. Even Mr. Harrison and his colleagues in 1867, in paragraph 4 of their report, said that "It should be specially provided that, except so far as combinations are exempted from criminal prosecution, nothing should affect . . . the liability of every person to be sued at law or in equity in respect of any damage which may have been occasioned to any other person through the act or default of the person so sued." Given the liability for individual action, it follows that the combination should be liable for concerted action, whether in the case of employers or employed.

The substance of the matter is that the Trade Unions are in reality asking for an exemption from the well-established law relating to conspiracy and agency which no individuals or association of individuals have ever as yet seriously sought, much less been allowed. It is, of course, true that in some ways capitalist employers have too long had "the whip hand" of their employés, but sympathy with the weaker multitude should not lapse into a reckless encouragement of extravagant demands. The social order of the whole community and the claims of the "employable unemployed" require the scales to be nicely balanced. Even one of the most advanced leaders of Trade Unionism, Mr. B. Tillett, speaking at the Leicester Congress in 1903, is reported to have said that he "wanted men to recognise that the common laws of the country were as good as they could expect them to be, not to whimper and claim more advantage, but to stand by the common laws of the country, and let the individual who infringed them take his risk and not be sheltered behind his union." The same proposition was stated even more tersely by Mr. Haldane[1] when he said that for Trade Unions to claim exemption from the general rule that a principal who delegates part of his business must be held responsible for the acts of his delegate, "would be to set up a claim of privilege."

There is no doubt that a mistaken view of a judicial decision taken by four members of the Royal Commission on Labour of 1894, is responsible for the erroneous notion that Trade Unions, before the "Taff Vale" case, had enjoyed a freedom from any interference by the Courts of law which "was, after prolonged struggle and Parliamentary agitation, conceded in 1871, and finally became law in 1876. Any attempt," they added, "to revoke this hardly-won charter of Trade Union freedom, or in any way to tamper with the

[1] "Contemporary Review," March, 1903. Mr. Haldane, Mr. Asquith, Mr. Morley and Sir Edward Grey did not join in the excited voting for the Labour Party Bill on March 30th.

voluntary character of their associations, would, in our opinion, provoke the most embittered resistance from the whole body of Trade Unionists, and would, we think, be *undesirable from every point of view.*" The assumption that the exemption had been obtained by the legislation is quite mistaken, and the misleading case (*Temperton* v. *Russell*) now stands overruled. It seems impossible, on a calm and level-headed examination of the Trade Union claim, and even in sympathy with its intention, to discover that a grave injustice would not be done to honest employers and a menace offered to society if the concession of this claim were added to the redress recently and very properly obtained by the toilers of the land. The following statement by Lord Dunedin, Mr. Arthur Cohen, K.C., and Mr. Sidney Webb is surely characterised by a kind of final wisdom and common-sense justice :—

"There is no rule of law so elementary, so universal, or so indispensable as the rule that a wrongdoer should be made to redress his wrong. If Trade Unions were exempt from this liability they would be the only exception, and it would then be right that that exception should be removed. That vast and powerful institutions should be permanently licensed to apply funds they possess to do wrong to others, and by that wrong inflict upon them damage, perhaps to the amount of many thousand pounds, and yet not be liable to make redress out of those funds, would be a state of things opposed to the very idea of law and order and justice. On what grounds can such a claim be supported? Trade Unions, which originally were looked upon as illegal combinations, have made out their claim to enfranchisement and existence. But having done so they cannot put their claims higher than to say that they are institutions which are beneficial to the community as a whole. But so are many other institutions—banks, railways, insurance companies, and so on. It may have been right to provide, as has been done, that the Courts shall not have power directly to enforce agreements between Trade Unions and their members in the same manner as they can in the case of shareholders and policy-holders in the institutions above mentioned. But when Trade Unions come in contact by reason of their own actions with outsiders, and *ex hypothesi* wrong those outsiders, there can be no more reason that they should be beyond the reach of the law than any other individual, partnership or institution. Such a claim has indeed

in former times been made by the spiritual as against the civil authority, and has been consistently disallowed. What was denied to religion ought not in our judgment to be conceded to Trade Unionism."

It must, however, be at once recognised that it would be a serious hardship, to say the least, on members of a union paying into the massed funds with a view to sick-benefits, pensions, and the like, that they should lose all at a blow by reason of damages given for unlawful conspiracy in a dispute of which they might not approve but were powerless to prevent. In any union there are always some younger members with no immediate interest in the "benefits," but impatient of what they hold to be cowardice or over-caution. It is curious that the "pro-union" members of the 1867 Commission were opposed to the suggested separation of funds, on the ground that the maintenance of a fund devoted entirely to trade disputes and purposes would increase the temptation to strike. They then stated [1] (and Mr. Frederic Harrison does not seem to have altered his opinion) that:—

"The truth is, that the trade objects and the benefit objects are indissolubly connected, and neither could exist without the other. . . . . It (the separation of the funds) would be an arbitrary interference with the liberty of association. If workmen are permitted to raise and expend funds on several objects, it appears vexatious and puerile to insist that these funds should give no mutual support where the several purposes are all part of the original agreement."

Moreover, Mr. Ludlow, speaking with special competence before the Labour Commission of 1894, as Chief Registrar of Friendly Societies and Unions, and as one convinced that trade protection is the primary legitimate function of Trade Unions, observed as follows:—

"The compulsory separation of funds appears to me to be contrary to the essential purpose of a Trade Union. People must take that risk when they join them—that inasmuch as

[1] Page 60 of the Report of the 1867 Commission.

it exists, as I have stated, for the maintenance and improvement of the condition of the worker, they must take the risk of every individual benefit being made subordinate to that. If they did not choose to take that risk, they ought not to join the Trade Union."

The Majority Report of the 1903 Royal Commission, however, boldly recommends "the facultative separation of the proper benefit funds of Trade Unions, such separation if effected to carry immunity from these funds being taken in execution." Lord Dunedin and Mr. Cohen, K.C., would limit this separation to sick, accident, and superannuation funds; while Mr. Sidney Webb would add the out-of-work fund, frankly making this benevolent fund available for indirect militant purposes. All three contemplate elaborate schemes of trust, limiting the purposes for which the moneys might be applied.

It will at once be seen that, except for a certain moral check on the members, this proposal will not operate to protect the "benefits" or "pensions" unless the new statute enacts immunity from execution as proposed. And before the Legislature would pass this, the same considerations of "privilege" again arise as in the general claim for exemption from the law of Conspiracy. Moreover, as Sir Godfrey Lushington forcibly points out in his separate report, "Thrift is a good object; but thrift comes after payment of just debts, and certainly not least, debts incurred in consequence of wrong-doing to others," and he reminds us that in the case of an individual debtor all insurance policies pass to his trustee in bankruptcy. He also alludes to practical difficulties, such as the absence of public audit and the non-separation in the accounts of many Trade Unions of payments to members who are out of work from slackness of trade and payments to members who are out of work because of a strike. Sir W. Thomas Lewis, the representative employer sitting on the Commission, goes so far as to say that "the Trade Unions of workmen have always been opposed to the separation suggested."

It would certainly seem to savour too much of partiality to the cause of Trade Unionism to grant this particular form of "facultative separation." The best solution of a difficult question might lie in a statutory provision for such a separation of militant and non-militant funds as would make the former primarily liable and the latter secondarily liable for execution for damages obtained for illegal strikes or picketing. This arrangement would not constitute any unwarrantable immunity for the latter, while it would operate as a check upon hasty strikes; it would, of course, be absurd to suppose that intending strikers could nicely calculate the damages in which they might eventually be mulcted in the event of an adverse result to litigation; but the very fact of the quasi-separation and the secondary liability might be expected to have a salutary effect upon the mind of each member as well as upon the common sense of the body. Industrial warfare, like intemperate drinking, is not likely to cease for many a long year, and the workers ought not to be robbed of the advances they have made towards the attainment of equality of fighting opportunity with employers. But it is necessary to avoid the creation of new and anomalous privileges and to maintain any reasonable safeguards against injustice on either side. By these means it will become more possible to avoid "the arbitrament of private war" or strikes for the settlement of industrial disputes. It ought not to be admitted that in a civilized country no other solution is possible for quarrels which arise on the one hand out of "sweating," and on the other out of damage caused by restriction of output or of apprenticeship. The imagination which is fired by the mere contemplation of these questions, involving such larger social justice and the greater happiness of so many thousand workers and their homes, may pause but it cannot turn away from the attempt to determine them. The one thing which seems certain is that Trade Unionism endangers its own future by pressing for this privilege of immunity. Employers must have the same freedom from damages, and a ring of capitalists with

unlimited funds out of reach of the law, besides being a danger to the State, would prove an irresistible foe to any union of workmen.

Among the subsidiary but important points dealt with in the Report of the Trade Disputes Royal Commission is the question of the illegal acts of branch agents. The majority of the Commissioners recommend that means should be provided whereby the central authorities of a Union may protect themselves against the unauthorised and immediately disavowed acts of branch agents. Sir Godfrey Lushington and Sir W. T. Lewis both dissent on the general ground that here again there is no reason why Trade Unions should enjoy a special immunity from the general law of agency; and, indeed, there would seem to be grave objections to granting this privilege. The law of agency happens to be well settled on reasonable and clear lines. The plaintiff would have to prove not merely that a legal wrong had been done to him and that the wrongdoer was an agent of the Trade Union, but that in doing the wrong he acted within the scope of his employment; if that authority is partly derived from the affiliation to the central union, it would be anomalous to allow that central union to call the tune without having to meet the payment of the piper. Or if it was felt that a hardship would be inflicted on members totally uninterested in a peculiarly local dispute, there might be some modification of the liability on very prompt disavowal, provided only that it were made a general alteration of the law, equally applicable to combinations of employers.

It is impossible here thoroughly to sift the difficult matter of Picketing, in which one comes very close to the dramatic and passionate incidents of unhappy trade warfare. The existing law, embodied in a section of the Conspiracy and Protection of Property Act, 1875, prohibits any person, with a view to compel another to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, from wrongfully and without legal authority using violence or intimidation to such person or his family,

persistently following him about and hiding his tools or other property; and, in particular, this method of compulsion is forbidden in the shape of watching and besetting the house or other place where such person resides or works or carries on business or happens to be, or the approach to such house or place, with the proviso that attending at or near the house or place or the approach thereto, in order merely to obtain or communicate information, is not to be deemed a watching or besetting within the section. In Mr. Whittaker's Bill of 1905 it was proposed to add to this last proviso a statutory freedom for "peacefully persuading any person to work or abstain from working," and Lord Dunedin and his colleagues in the Majority Report now suggest the substitution of a single new test for application to all cases of intimidation by picketing, viz., acting "in such a manner as to cause a reasonable apprehension in the mind of any person that violence will be used to him or his family or damage to be done to his property." But one is not quite sure, human nature among bread-winners in excited moments being what it is, and what it is likely to remain for some time to come, that "peaceable persuasion," where no limit can be put upon the number of "persuaders," is more than a paper phrase. Even the Commissioners confess that "picketing, however conducted . . . is always and of necessity in the nature of an annoyance to the person picketed. As such, it must savour of compulsion, and it cannot be doubted that it is because it is found to compel that Trade Unions systematically resort to it." They themselves admit that the evidence before them, which the Trade Unions had made no attempt to contradict, was overwhelming to the effect that "watching and besetting for the purpose of peaceably persuading" is really a contradiction in terms. Sir Godfrey Lushington and Sir W. Thomas Lewis are, from different standpoints, so agreed that picketing *in toto* is an abuse calling for urgent remedy that they would leave the law where it stands, with the repeal of the proviso as to attending merely to obtain or communicate information.

It is again a problem where sympathy inclines to the proposal of the workers who in the face of much harsh and selfish treatment by employers are grasping at means for earning a fairer "living wage," and for winning better opportunities of recreation and leisure. But the social rights to which they are entitled, and many of which they are slowly, too slowly, winning do not include a right to win more by doing a wrong to others. The social contract, as well as all considerations of law and equity, forbid it. It is notorious that since the decisions in *Lyons* v. *Wilkins* and the *Taff Vale* case, strikes and picketing have been less frequent; it is equally obvious that "Labour" is in a far stronger position, morally and in practice, in spite of the alleged set-back. If the law is simplified in the manner proposed by the two Minority Reports, employers and workers will know clearly where they stand in this matter; strife will be less, with a consequent diminution of suspicion and distrust; and serious public opinion, which at present seems to be favourably impressed with the fresh advent to power of the Labour Party, is likely to increase its growing protest against the malevolent acts of Capital. It need hardly be pointed out that the cessation of strikes will, for the workers, release funds for "benefits" and "pensions." If a firm and sensible attitude is adopted at this important and psychological moment in the history of trade combinations, the result will assist those ends of thrift, co-operation and peaceful arbitration, to which the years are slowly but surely revolving.

As regards the Law of Conspiracy only Sir W. Thomas Lewis, whose able and frankly partial plea for the employers demands and repays the most careful attention, dissents from the recommendation of the Royal Commissioners, that an agreement by two or more persons to do an act in furtherance of a trade dispute should not be the ground of a civil action unless it be indictable as a conspiracy, notwithstanding the terms of the Conspiracy and Protection of Property Act, 1875. It is true that there are some logical difficulties in the way of overruling by statute the decision of the judges in

Quinn v. *Leathem*, when it has been submitted as above that the *Taff Vale* decision should stand. But it would seem equitable that protection conceded in 1875 on the criminal side should now be granted on the civil side. Trade Unions, it must be always remembered, necessarily act by means of combination. Only so can they meet the employer upon anything like an equal footing. Given the prohibition against picketing in any shape or form, and the protection to the employer of having the opponents' union's funds to look to for damages, it would seem only fair that here at any rate the State should provide that for the *bonâ fide* purposes of trade disputes Trade Unions, which so necessarily act by means of combination, should be put in a special position, and that the civil side of the question should be dealt with as liberally and fully as the criminal.

Whatever may be the particular modification of any new trade disputes legislation, it is much to be hoped that the law as to Arbitration Acts will also be extended. The modern Conciliation Acts, terminating for the present with the Conciliation Act of 1896, restrict governmental interference in trade disputes to mere inquiries into the circumstances of a particular dispute, or to an arbitration on the application of *both* parties. But if, as common sense requires, the State should aim at prevention as well as cure, then public opinion should be instructed to press for compulsory arbitration or the regulation of labour by the State. When that stage is reached it will become a question whether the Judges of the Courts, as at present appointed, will care or be able to act as arbitrators. The work would require special knowledge of trades, which it is impossible that most mere lawyers should possess; and such arbitrations would oblige the arbitrators to travel outside those strict judicial functions which belong to the English Bench. On the other hand, a Parliamentary Cabinet, as the Executive of the Government, could not be expected to be impartial, and would be inhuman if it had no eye to the next General Election! The solution would probably lie in the appointment of a

special Court or Council of Trade Commissioners with powers to enforce their awards.[1]

In conclusion, it may be said that the law affecting Labour has necessarily become complicated, as with the growth of the factory system and the desuetude of apprenticeship, leading employers to prolong the hours and to employ youthful labour, the evils to be guarded against have increased. Moreover, the monotony of many industries, attributable to the science which has made "a machine more and more a man, and a man more and more a machine," has created a new need for the State to take measures to secure something of the pleasure and savour of life for its toilers, with a greater equality of opportunity for enjoying them. The new conception of the health and efficiency of the body of workers as an important asset of the national life has, as pointed out by Sir John Macdonell in his recently delivered Quain lectures on "Modern Labour Legislation," already produced startling results, more in foreign countries and in the English Colonies than in Great Britain itself. A strict tendency to uniformity marks the different groups of Labour Laws like the Franco-Belgian, the Anglo-American, the Neo-Saxon, and those of Germany, Austria and Hungary. In the last named there is an emphasis on insurance and pensions, associated with the name of Bismarck. In the Neo-Saxon group, in our Colonies, there is a growing tendency for the State to limit wages and intervene in trade disputes; experimental legislation in New Zealand and Australia, the success of which, it should be stated, is not generally

[1] Such Commissioners might even be given jurisdiction in cases concerning trade marks and in "passing off" actions, for it is alleged that a closer knowledge of the ways of the commercial world and its markets would lead to more satisfactory decisions. After the above was written the following words appeared in a letter in the "Morning Post" for March 27th, 1906 :— "Probably it will be found that the final solution must be deferred until opinion is ripe for the creation of industrial tribunals to enforce collective bargaining, and provide a judicial method of determining trade disputes." The same point was also urged by the Hon. B. R. Wise, formerly Attorney-General for New South Wales, in a letter to the "Times" of March 30th, 1906.

admitted, has endeavoured to apply to the fields of industrial conciliation and arbitration, for all conditions of employment and practically all classes of labour, the principles long since adopted in the home country in factory, mines, shops and sanitary laws as to some conditions and certain classes. The chief characteristics of the Anglo-American group are the existence of powerful Trade Unions, created by the workers themselves and already endowed by law with a distinct legal status, and a stringent system of factory regulations enforced by vigorous inspection. In France, where the State has been very active, a law relating to Professional Syndicates, passed by the late M. Waldeck-Rousseau, is described by Sir John Macdonell as one of the most notable and novel measures yet passed in the interests of labour. He says of it that—

"It was prepared with the intention of accustoming workmen to unite to concentrate and to solidify their forces, powerless in isolation and likely to be fruitful if grouped. Perhaps the most important article in the law was that which stated that the syndicates might freely combine for the study and the defence of their economic and industrial interests, a provision which invested them with a quasi-public character, which stamped with immunity or privilege conduct which otherwise would expose the syndicates or their officers to legal proceedings. These syndicates might be formed of more than twenty persons practising the same professions, or similar trades or professions, or professions connected therewith. Before being formed they were required to deposit their statutes or articles of associations at the mairie, or, in the case of Paris, at the préfecture. These syndicates had the right to sue in their own name, and they might also employ for the purpose of litigation any sums which arose from the subscriptions of the members. They were forbidden to hold more than a very limited amount of real property. Demands by violence, threats, &c. to compel persons to enter or leave the syndicates were prohibited. Implied in that law were great changes and large powers. So long as a syndicate was acting in the interests of a particular trade

there was no limit to its powers, practically speaking. It might denounce or put on the black list a particular factory or workshop as contravening a particular article or contracts in force as being against the interests of the particular trade. No doubt, to be protected the syndicate must have in view the general interests of the trade. It must not seek from purely personal motives to injure an individual. It might compel its members to accept the syndicate tariff of wages recognized in collective contracts, and it might expel a member who accepted a lower rate. The Act put groups of workmen, for the purpose of litigation and the law courts, in the same powerful position in which Trade Unions and their funds placed them from an economic point of view."[1]

It is earnestly to be hoped that in the coming days our own Government will put its great opportunity to a use at once liberal and wise. For reasons, a few of which have been touched upon above, Parliament may hesitate to enact all the suggestions of the Labour Party or the recommendations of the Majority Report, even though the eminent authors of that

[1] This law is printed in Dalloz (1884), 4th part, at p. 129. At p. 133 is given the text of Article 7, which may be translated as follows:—

"Every member of a professional syndicate can withdraw at any time from the association, notwithstanding any clause to the contrary, but without prejudice to the right of the syndicate to call in his contribution for the current year.

"Every one who withdraws from a syndicate preserves the right of being a member of the societies for mutual assistance and for old age pensions to the assets of which he has contributed by club subscriptions or payments."

As explained in a circular by M. Waldeck-Rousseau, this Article assures the liberty of the unionist, and the second clause of it is irreconcileable with the existence of a common chest for the syndicate and for the societies created within them. I am told by a friend who is an eminent practising lawyer in Paris that as these "syndicates" possess corporate capacity, "it would not require a Taff Vale decision to render them liable for their torts." An attempt is now being made to extend their operation to subordinate civil servants ("fonctionnaires de gestion") like postmen. It is not proposed to extend it to such "fonctionnaires d'autorité" as policemen, as the syndicates have the right to go out on strike, and it is felt, sensibly enough, that for policemen to have this right might disorganise the whole machinery of government.

Report who agree in it are men of such different experience and outlook as the former Secretary for Scotland in the late Tory Government, a distinguished Liberal lawyer and the chief historian and economist of the avowed friends of Trade Unionism. It is certain and indeed right that the capitalist views expressed by Sir W. T. Lewis should receive an anxious consideration before the zeal of the Labour Party sways its sympathetic colleagues into friendly but too hasty legislation. It is, after all, essential for even a partial solution of this intricate problem that it should be approached in a spirit of mutual toleration as well as with a larger regard than the Englishman is apt to give to the phases through which Labour Legislation is passing in the countries outside our own. What is acceptable for continental countries like France and Germany is not necessarily appropriate for this island in this matter any more than in the problem of Free Trade and Tariffs. But the communities of the world are now so linked up and the interchange of ideas and standards of life is so quick that a large amount of uniformity in the regulations of industry is as possible as it is desirable. This end is likely to be promoted by recalling at every stage of industrial legislation or litigation, and in a spirit of reasonableness and equity, the solemn warning of a great Englishman who seventy years ago could scarcely have foreseen the early and substantial emancipation of those on whose behalf his appeal was made.

"This neglect," wrote Dr. Arnold in 1838, namely, to provide a proper position in the State for the manufacturing population, "is encouraged by one of the falsest maxims which ever pander to human selfishness under the name of political wisdom. I mean the maxim that civil society ought to leave its members alone, each to look after their several interests, provided they do not employ direct fraud or force against their neighbour. That is, knowing full well that these are not equal in natural powers, and that still less have they ever within historical memory started with equal artificial advantages; knowing, also, that power of every sort

has a tendency to increase itself, we stand by and let this most unequal race take its own course, forgetting that the very name of society implies that it shall not be a mere race, but that its object is to provide for the common good of all, by restraining the power of the strong and protecting the helplessness of the weak." [1]

[1] Arnold, Miscellaneous Works, pp. 453-4, cited by Professor Dicey in "The Relations between Law and Public Opinion."

APPENDIX.

A. The Government Bill brought in by the Attorney-General (Sir J. Lawson Walton) on the 28th March, 1906, proposes as follows :—

1. The following paragraph shall be added as a new paragraph after the first paragraph of section three of the Conspiracy and Protection of Property Act, 1875 :—

> "An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable as a tort."

2.—(1) It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union in contemplation or furtherance of a trade dispute, to attend, peaceably and in a reasonable manner, at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of obtaining or communicating information, or of persuading any person to work or abstain from working.

(2) Section seven of the Conspiracy and Protection of Property Act, 1875, is hereby repealed from "attending at or near" to the end of the section.

3. An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable as a tort on the ground only that it is an interference with the trade, business, or

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employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills.

4.—(1) Where a committee of a trade union constituted as hereinafter mentioned has been appointed to conduct on behalf of the union a trade dispute, an action whereby it is sought to charge the funds of the union with damages in respect of any tortious act committed in contemplation or furtherance of the trade dispute, shall not lie, unless the act was committed by the committee or by some person acting under their authority:

Provided that a person shall not be deemed to have acted under the authority of the committee if the act was an act or one of a class of acts expressly prohibited by a resolution of the committee, or the committee by resolution expressly repudiate the act as soon as it is brought to their knowledge.

(2) The committee may be a committee appointed either generally to conduct all trade disputes in which the union may be involved, or to conduct any trade disputes of a specified class or in a specified locality, or to conduct any particular trade dispute.

(*Note.*—It is noteworthy that in introducing this Bill the Attorney-General declared his opinion that it would leave no opening for a question for a jury, as he could not conceive a case which would not be determined as a matter of law. This is at any rate doubtful as to the picketing that is legalised.)

B. The Labour Party Bill read a second time on the 30th March, 1906, proposes as follows:—

"1. It shall be lawful for any person or persons acting either on their own behalf or on behalf of a trade union or other association of individuals, registered or unregistered, in contemplation of or during the continuance of any trade dispute, to attend for any of the following purposes at or near a house or place where a person resides or works, or carries on his business, or happens to be—

"(1) for the purpose of peacefully obtaining or communicating information;

"(2) for the purpose of peacefully persuading any person to work or abstain from working.

"An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute shall not be ground for an action, if such act when committed by one person would not be ground for an action.

"3. An action shall not be brought against a trade union, or other association aforesaid, for the recovery of damage sustained by any person or persons by reason of the action of a member or members of such trade union or other association aforesaid."

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